IN THE MATTER OF ARBITRATION	**GRIEVANCE ARBITRATION**
between	
Norman County, Ada, Minnesota	**Health Insurance Incentive Payments**
-and-	**BMS Case No. 04-PA-1016**
AFSCME Minnesota Council 65	**August 10, 2005**

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APPEARANCES

For Norman County

Thomas A. Opheim, County Attorney
Steven M. Bommersbach, County Commissioner Chairman
Rick Munter, Auditor/Treasurer

For AFSCME Minnesota Council 65

Teresa Joppa, Staff Attorney
David Mortenson, Staff Representative
Wayne Gwin, President
Conrad Vanderlinden, Vice President
Liz Vaugh, Secretary-Treasurer

JURISDICTION OF ARBITRATOR

Article 6, Employee Rights-Grievance Procedure, Section 6.4.4, Step 4 of the 2003-2005 Collective Bargaining Agreement (Joint Exhibit #1) between Norman County (hereinafter "County" or "Employer") and AFSCME Minnesota Council 65 (hereinafter "Union") provides for an appeal to final and binding arbitration of disputes that are properly processed through the grievance procedure.

The Arbitrator, Richard John Miller, was selected by the County and the Union (hereinafter "Parties") from a panel submitted by the Bureau of Mediation Services. A hearing in the matter convened on June 29, 2004, at 9:30 a.m. at the Norman County Courthouse, Ada, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his records. The Parties were afforded full opportunity to present evidence and arguments in support of their respective positions. The Parties elected to file posting hearing briefs which were received on August 2, 2004, after which the record was considered closed.

The Parties agreed that the grievance is a decorous matter within the purview of the Arbitrator, and made no procedural or substantive arbitrability claims.

ISSUE AS FRAMED BY THE ARBITRATOR

Is the County obligated to continue making the $25 per month/$300 per year health insurance incentive payments to employees?

STATEMENT OF THE FACTS

In 1990 the County was faced with increasing health insurance costs for its employees. In order to reduce the cost of the health insurance coverage, especially for families, the County Board decided that it was advantageous to solicit bids that provided for a deductible amount that would be paid by the employee. Previously, the health insurance policy had no deductible amount.

Minnesota Law required that before such a change in health insurance could be adopted, the employees must vote and consent to the change of policy. The County entered into negotiations with all County employees. As a result of discussions between the Union and County Board, the County Board adopted a Resolution dated June 18, 1990, which set forth the County Board's proposal to County employees, including the Union units involved in this arbitration (Social Services Unit and Highway Unit). (Joint Exhibit #5). The Resolution provided for "incentive" payments in the amount of $25 per month to each full time employee with health insurance if they accepted a higher deductible policy. (Id.)

Prior to the vote by the County employees, the County had coverage with Blue Cross Blue Shield which had no deductible. (Joint Exhibit #17). The County's proposal was to accept the bid from Insurance Technology Services which provided for a $250.00 deductible per person/ S750.00 deductible per family coverage. The reduced cost would result in savings to the County. In order to obtain a favorable vote among County employees, and allow the County to go to a policy with a deductible, the County Board offered in their June 18, 1990 Resolution the compensation package ($25 per month/$300 per year), contingent upon the following terms and conditions:

> This proposal of the County is conditional upon the following two conditions:
>
> 1. That the County shall have health insurance with the same company and the same deductible and with the same benefits and
>
> 2. If the insurance premiums do not decrease.
>
> In the event that the [County] obtains health insurance protection through a different company or with a different deductible or providing different benefits, or in the event the premium decreases, then the County's obligation to pay $300.00 per year shall terminate.

(Joint Exhibit #4). The employees voted in favor of the modification of the health insurance benefit based upon the compensation package ($25 per month/$300 per year) and the terms and conditions set forth in the County Board's June 18, 1990 Resolution. Thereafter, the County changed insurance companies from Insurance Technology Services to PEIP and currently with Blue Cross and Blue Shield. (Joint Exhibits #8-11). At the present time, the County policy with Blue Cross Blue Shield does not have a deductible. In addition, the premium has decreased. (Joint Exhibit #12). The County, despite the fact that the terms and conditions set forth in Resolution of June 18, 1990, have been met, continued the monthly payment of $25 (these payments were either used to reduce the portion of the insurance premium paid by the County or paid annually to the employee in December of each year).

On April 21, 2003, the County sent an e-mail to the Unions and all non-union employees of their intent to consider termination of the incentive payments at its meeting to be held on May 22, 2003. (Joint Exhibit #6). At the May 22, 2003 meeting, after discussion with the Union Representatives and non-union employees, the County Board voted to terminate the compensation payments of $25 per month, effective June 1, 2003, in response to reduced government aide from the State of Minnesota. (Joint Exhibit #7).

The Parties agree that during the negotiations between the Parties for the current Contracts there was no discussion of the $25.00 per month incentive payments. (Joint Exhibits #13, 14). In fact, is undisputed that during collective bargaining negotiations between 1990 and 2003 the Parties never discussed the continuance or termination of the $25 per month incentive payments, and the payments have never appeared in any of their collective bargaining agreements. There is also no mention in any County Board resolutions or any other documents of terminating the incentive payments until the May 22, 2003 Resolution. (Joint Exhibit #15).

The Parties concluded bargaining in February 2003 for the current Highway Contract and Social Services Contract, which endures from January 1, 2003 through December 31, 2005. (Joint Exhibits #1, 2). Thus, the termination of the incentive compensation by the County Board on May 22, 2003, occurred shortly after the Parties negotiated, typed and signed the current Contracts. For each Union member the termination of the incentive payments took away one-half of the pay increase just agreed to under the new Contracts.

The Union, on behalf Highway Department and Social Service Department bargaining unit employees, filed a grievance on June 2, 2003, protesting the County Board's decision to terminate the $25 per month incentive payments. (Joint Exhibit #3). The grievance was denied by the County, and the Union ultimately appealed it to final and binding arbitration pursuant to the contractual grievance procedure. (Joint Exhibit #16).

UNION POSITION

The County violated a long standing past practice, that the County violated state statutes regarding negotiating terms and conditions of employment and negotiating in good faith, and also committed a unfair labor practice such as is described in a recent Minnesota Court of Appeals case, Education Minnesota - Greenway Local 1330 v. Independent School District #316, 673 N.W. 2d 843, (Minn App 2004, rev denied April 20, 2004). The County should be ordered to bargain over any change in the incentive in the future, pursuant to Minnesota statutes.

The Arbitrator should order the County to pay back the incentive payments, under the same terms as it has done for the last thirteen years, to each employees affected, dating back to June 2003. And that the County be ordered to continue paying the same $25 incentive payments into the future until such time as the Parties agree to end the incentive or change it in some other manner; and such other remedy as would be deemed fair by the Arbitrator.

COUNTY POSITION

The intent of the Parties was that the payments commenced in 1990 would continue as long as there was not a change in the circumstances as reflected in the Resolution itself. There is no question that the conditions have changed and the terms authorizing the termination of the payment benefit have been met, thereby conferring upon the County the authority under the past practice agreement of the Parties to terminate this agreement. County Boards change and memories fade, but the mere nonuse of a right does not entail a loss of it. In this case, the mere failure of the County Board to terminate the benefit does not mean that the County ever advocated or relinquished its right to do so.

The benefit was not a past practice, but if it was a past practice the expressed language of the current Contract supersedes it and, in the alternative, if it is a past practice, the past practice is determined by the intent of the Parties as set forth in the Resolution itself, and that by virtue of the changed circumstances and the terms of the Resolution having been met, the County is authorized to terminate the benefit. Parties.

Based upon these arguments the grievance and all requested remedies should be denied.

ANALYSIS OF THE EVIDENCE

The payments of a $25 per month/$300 per year health insurance "incentive" to each and every full time County employee was established in 1990. The justification for making the incentive payments were to obtain a lower cost for health insurance by adding, for the first time, a deductible feature that would be paid out-of-pocket by employees. Two AFSCME bargaining units, as well as all other County employees, agreed to accept the incentive payments in exchange for accepting a deductible amount that would be paid by the employees. The

County employees voted on this change and the County Board passed a resolution to that effect on June 18, 1990.

The County Board's resolution established some conditions by which the incentive payments could end. It is undisputed that the County has met those conditions years ago. The County changed insurance companies from Insurance Technology Services to PEIP and present with Blue Cross Blue Shield. The present County policy does not have a deductible and the premium has decreased. In spite of meeting those conditions many years ago, there was no County Board action to end the incentive payments until the June 23, 2003 Resolution. This Resolution to end the incentive payments occurred shortly after the Parties agreed to new Contracts and signed them. The economic impact of ending the incentive payments is that each Union member lost one-half of the pay increase just agreed to under the new Collective Bargaining Agreements.

It is clear from the evidence that the County has the right to terminate the incentive payments by virtue of meeting the conditions set forth in the June 18, 1990 Resolution. The questions, however, becomes "when" and "by what method" can they end the payments. The County claims that there is no past practice that is binding upon the Parties, so the Employer was justified to end the incentive payments effective June 1, 2003.

The Union, on the other hand, contends that there is a binding past practice. The Union admits that the County can terminate this past practice, but must do so during the next round of negotiations. Past practice has been defined as "a prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances." Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; and (5) mutuality. Ramsey County v. AFSCME, Council 91, 309 N.W.2d 785, 788, fn.3 (Minn. 1981).

In this case, the incentive payments meet the above past practice criteria. The incentive payments were clear and consistent; nothing indefinite or uncertain about them. They were clearly enunciated and acted upon; both Parties in fact recognized the payments in writing when it was first implemented. They were ascertainable over a period of time, as they had been paid monthly to each employee by the County for over ten years. Finally, the payments were a fixed and established practice accepted by both Parties, in spite of the fact that underlying circumstances changed which allowed the County to meet the termination conditions set forth in the June 18, 1990 Resolution.

Evidence of custom and practice may be introduced to provide the basis of rules governing matters not included in the written contract; to indicate the proper interpretation of ambiguous contract language; or to support allegations that the clear language of the written contract has been amended by mutual action or agreement representing the intent of the parties to make their written language consistent with what they regularly do and practice in the administration of their labor agreement. Past practice cannot be used when the contract language is clear on its face. In this case, the incentive payments created a binding past practice on the Parties, which provides the basis for matters not included in their Contracts. Arbitrators and courts developed the "past practices doctrine" because of the impossibility of negotiating every single item in the labor agreement. As a result, Minnesota and Federal courts have given this specific direction to arbitrators: "[tlhe labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial law--the practices of the industry and the shop - in equally a part of the collective bargaining agreement although not expressed in it." <u>Duluth Police Union v. City of Duluth,</u> 360 N.W.2d 367, 370 (Minn. Ct. Ap. 1985) quoting <u>AFSCME, Council 91,</u> 309 N.W.2d at 791 quoting <u>United Steel Workers of America v. Warrior & Gulf Navigation Co.,</u> 363 U.S. 574, 581-82 (1960).

Therefore, the Arbitrator may take the past practice of the incentive payments into account in addition to the terms and conditions contained in the Contracts.

Article 17.1 of the Contracts provides that "[a]ny and all prior agreement, resolutions, practices, policies, rule, and regulations, regarding terms and conditions of employment, to the extent inconsistent with the provisions of this Agreement, are hereby superseded." Neither the past practice that evolved from the June 18, 1990 Resolution, nor the Resolution itself, are inconsistent with the provisions of the Contracts.

Article 4.2 of the Highway Department Contract and Article 4.1.1 of the Social Services Contract provides that "[a]ny term and condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the Employer to modify, establish or eliminate." It is clear the incentive payments became an "established" term and condition of employment and not merely "gratuity" payments, as if they had been written into the Contracts, by virtue of the past practice. Thus, the County cannot unilaterally terminate the past practice at its discretion.

A collective bargaining agreement is negotiated based on the understood method of handling a myriad of matters too numerous to express in writing even if specification were thought desirable. The contract is predicated upon application in a known environment and might be different if one or more accepted practice in the context of which the agreement is expected to operate were subject to unilateral change during its duration. Accordingly, an agreement implies the continuation of the established practices in existence when the agreement was executed. As had been explained:

> Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For,...if a practice is not discussed during negotiations many of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect. The inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuation of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.

Richard Mittenthal, Past Practices and the Administration of Collective Bargaining Agreements, 59 Michigan Law Review 1017, 1040-41, 1961. Under this principle, which is often referred to as the implied obligation doctrine, the County cannot unilaterally discontinue the incentive payments practice which has existed since 1990, except during successor collective bargaining negotiations. Since the long-standing past practice as not discussed by the Parties nor rescinded by the County in negotiations of the current Contracts, the Employer is deemed to have an implied obligation to maintain the practice of maintaining the incentive payments. If the County seeks to eliminate the long-standing practice, they must inform the Union during successor negotiations that the practice is no longer in effect. The Union will then have the opportunity to negotiate the practice into the successor contract. If no changes are made in negotiations, the long-standing practice will no longer exist. Only after all of foregoing conditions are met can the County eliminate the practice.

The doctrine of equitable estoppel also has application in this case. The doctrine was explained in as follows:

> The doctrine of estoppel in pais (equitable estoppel) in its traditional form states that a party who is guilty of a misrepresentation of existing fact upon which the other party justifiably relies to his detriment is estopped from denying his utterances or acts to the detriment of the other party. ...Similar cases may arise where, although there is no misrepresentation of existing fact, a party makes a promise upon which the other relies to his detriment. ...At any rate it is now clear that under the modern doctrine of estoppel a misrepresentation of fact is not necessary--a promise or innocent representation of fact being sufficient to form the basis of an estoppel whether it be denominated "equitable" or "promissory."

The Law of Contracts, at pp. 268-69 (1st ed. 1970). The record indicates that during bargaining for the Contracts, the County stated that there would be no change in health insurance if the Union agreed to the County's wage increase. In fact, the County warned the Union that if they did not agree to the County's wage proposal, they would "take a hard look at insurance." The Union agreed with the County's wage increase, and relied upon the statement that there would be no change in health insurance, which would include the incentive payments. Thus, the County's representations during bargaining are sufficient to trigger the doctrine of equitable estoppel in this situation where Union relied upon such representation to their detriment.

County Commissioner Steve Bommersbach testified that when the Parties were negotiating the Contracts, the County Board was not aware of the June 18, 1990 Resolution, and were not aware that the conditions authorized the County Board to terminate the incentive payments. However, Union witnesses testified that during the processing of the grievance, County Commissioner Warren Olson stated along the lines of "did the Commissioners intentionally not bring the issue [the incentive payments] up at the bargaining table, well maybe we did." Commissioner Olson never refuted this testimony. Consequently, the County deprived the Union of the opportunity to bargain over this term and condition of employment by purposely not bringing up the incentive payments at the bargaining table. Thus, the Union was deprived of the "unlimited right and opportunity to make demands and proposals with respect to any term or conditions of employment..." under Article 17.2.

Even if Commissioner Olson did not make this comment, it would make no sense that the Union would agree to the County's wage increase, and agree to no change in health insurance, and then have their wage increase reduced by one-half by having the County rescind the incentive payments shortly after the signing of the Contracts.

Minnesota statutes require that public employers negotiate in good faith the terms and conditions of employment with the exclusive representatives of its employees. Specifically, Minnesota statute § 179A.07, subdivision 2 sets out a public employer's obligation to meet and negotiate in good faith with the exclusive representative of public employees over their terms and conditions of employment, and statute § 179A.13, subdivision 2, says that an employer who has refused to meet and negotiate in good faith with the exclusive representative has committed an unfair labor practice. "Terms and conditions of employment" are defined in §179A.03, subdivision 19 as the "hours of employment, compensation therefore including fringe benefits..." The definition of "meet and negotiate" is found at § 179A.03, subdivision 11, and it too says that a public employer has an obligation to meet with the exclusive representative in "good faith with the intent of entering into an agreement on the terms and conditions of employment."

An example of "good faith" bargaining is not to withhold an issue from the bargaining table. It is not "good faith" bargaining to unilaterally change a term and condition of employment mid-contract and then refuse to bargain over it. Education Minnesota - Greenway Local 1330 v. Independent School District #316, 673 N.W. 2d 843 (Minn App 2004, rev denied). Yet, that is essentially what the County did in this case. The County made a unilateral change in a term and condition of employment, a well established past practice of paying the incentive payments, mid-contract. The County deprived the Union of the opportunity to bargain over this term and condition of employment, whether purposely or not, by not bringing up the subject matter of the incentive payments at the bargaining table.

AWARD

Based upon the foregoing and the entire record, the grievance is sustained. The County shall continue and pay back the incentive payments to all affected Union employees. If the County seeks to eliminate the long-standing practice, the County must give notice to the Union during collective bargaining negotiations for the successor contracts that the incentive payments will terminate upon the effective date of the new contracts. This proper notice of terminating the incentive payments will then give the Union the opportunity to negotiate with the County the continuance of this practice. If the Union is unsuccessful in negotiations, the practice will no longer exist.

Richard John Miller

Dated August 10, 2005, at Maple Grove, Minnesota.